U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 0 8 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. According to Part 6 of the Form I-140, the petitioner seeks employment as a "Special Education Teacher" for The petitioner has worked for since 2005. At the time of filing, the petitioner was teaching at Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." The petitioner did not execute this required document for the petition, and

therefore the petitioner has not properly applied for the national interest waiver. For this reason alone, the petitioner has failed to establish eligibility for the benefit sought.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner has established that her work as a special educator is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of the petitioner's work would be national in scope and whether she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. Assertions regarding the overall importance of an alien's area of expertise cannot suffice to establish eligibility for a national interest waiver. *NYSDOT* at 220. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

The petitioner filed the Form I-140 petition on June 29, 2012. In Part 4 of the Form I-140, the petitioner answered "no" to whether any petitions had previously been filed on her behalf. The record, however, reflects that filed a Form I-140 petition, with an approved labor certification, on her behalf on June 22, 2009, to classify her as a professional under section 203(b)(3)(A)(ii) of the Act. The Texas Service Center approved the petition on June 30, 2009, with a priority date of August 10, 2008.

In a June 28, 2012 letter accompanying the petition, counsel asserted that the petitioner's national interest waiver is based on her expertise in the field, advanced degrees, achievements, citations, and ten years of experience as a teacher. Academic degrees, experience, and recognition for achievements (such as citations) are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. The petitioner's expertise as a special educator and recognized achievements will be further discussed later in this decision.

Counsel further stated:

> [The petitioner] made an indelible impact in her school and community that they dread the idea of seeing her leave for good. But with the circumstances surrounding her immigration status this unsavory outcome is very possible – unless your good office acknowledges her expertise and her undeniable contributions to our national interest.

The U.S. Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by [1] This debarment means that is, temporarily, unable

[1] The list of debarred and disqualified employers is available on the U.S. Department of Labor's website. *See* http://www.dol.gov/whd/immigration/H1BDebarment.htm, accessed on September 6, 2013, copy incorporated into the record of proceeding.

to file its own petition on the alien's behalf for a classification other than the one for which she was already approved, and thus explains why labor certification is not an option in the short term. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that she will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT* at 218, n.5. Any waiver must rest on the petitioner's individual qualifications, rather than on the circumstances that (temporarily) prevent from filing a petition on her behalf.

In his letter accompanying the petition, counsel did not mention the *NYSDOT* guidelines or explain how the petitioner meets them. The record does not show how the petitioner's work would impact the field beyond With regard to the petitioner's special education teaching duties, there is no evidence establishing that the benefits of her work would extend beyond her students at such that they will have a national impact. *Id.* at 217, n.3 provides examples of employment where the benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

In the present matter, the benefits of the petitioner's impact as a special educator would be limited to students at her school and, therefore, so attenuated at the national level as to be negligible. In addition, the record lacks specific examples of how the petitioner's work as a teacher has influenced the education field on a national level. At issue is whether this petitioner's contributions in the field are of such unusual significance that she merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification she seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submitted various letters of support from administrators, teachers, and parents discussing her work as an educator. As some of the letters contain similar claims addressed in other letters, not every letter will be quoted. Instead, only selected examples will be discussed to illustrate the nature of the references' claims.

Principal, , stated:

> [The petitioner] has been under my supervision for over 6 years. . . . [The petitioner] is an excellent teacher who exhibits professionalism that ranks high in the school. She has served the school and her children superbly and continues to be a valued member of our staff. She is a contributing member of the Autism Program and has been for more than 6 years.

[The petitioner] actively participates in team building activities, staff developments and school-wide activities. [The petitioner] participates in after-school, evening and special events. [The petitioner] is neat, organized, creative, and has a wealth of knowledge. She continues to display highly effective oral and written communication skills, and maintains effective home-school relationships with the parents and guardians of all children.

In addition, [the petitioner] encourages all children to reach for their potential, and beyond. She is a visionary who wants all children to succeed and encourages them daily. Her commitment is to the children each year and she ensures that they are successful. She listens to children; talks with them, while analyzing what is in their best interest.

Furthermore, [the petitioner] has been extremely successful at discovering the needs of her children with regards to educational and emotional problems, and is the ultimate advocate for all children. [The petitioner] has worked extremely well with the special education department here at [redacted] understands and designs Individual Educational Plans (IEP).

Mr. [redacted] comments on the petitioner's activities at [redacted] and her effectiveness as a teacher, but he does not indicate that the petitioner's work has had, or will continue to have, an impact beyond the students under her tutelage and the local school system that employed her.

[redacted] Special Education Coordinator, [redacted] stated:

As a kindergarten teacher of autistic learners, [the petitioner] has consistently implemented the use of teaching strategies that are aligned with principles and standards found in Universal Design for Learning (UDL). She was responsible for executing the county curriculum as well as the mandates of student's Individualized Education Plans (JEP). Her use of alternative methods for instruction address student needs related to communication, sensory input, fine motor and gross motor tasks, fluency, attention and cognition, as well as social skills.

* * *

[The petitioner] showed great resolve and determination as she learned to deal with the many challenges that parents could bring to the table. She was open to support and suggestions at all times. Admirably she never lost site [sic] of her responsibility, educating her students.

[The petitioner] has also been responsible for managing her paraprofessional staff as well as related services providers and IEP development. She has always been and continues to be diligent in her efforts to participate in professional development opportunities that maintain and increase her proficiency as a special educator.

> [The petitioner] has become quite efficient in her ability to extract specific skills within the core academic content areas (math, reading, science, social studies) using creative methods to assess student achievement based on their academic, cognitive and functional capabilities. Over the past several years her skills and knowledge of the general education curriculum has allowed her to work even closer with the general education kindergarten teacher in a co-taught educational setting. [The petitioner] has regularly participated in "collaborative planning" with her general education counterpart. Now in her final year, [the petitioner] has transferred her experiences, strategies, and work ethic to our fifth grade self-contained autism class. She has been predictably successful.
>
> [The petitioner] has a wonderful personality and professional approach that drives her to continue to ask for input from those that have successfully come before her. She has a great rapport with the parents/guardians of her students because she can answer the question "why?" through the collection of data. [The petitioner] will raise the level of professionalism of any staff based on her personal standards of performance.

Mr. [redacted] comments on the petitioner's personal qualities, professionalism, and activities as a special education teacher at [redacted] but he does not indicate how the petitioner's impact or influence as a special educator is national in scope. In addition, Mr. [redacted] points to the petitioner's teaching skills, knowledge of the general education curriculum, and experience. However, any objective qualifications which are necessary for the performance of the occupation can be articulated in an application for alien labor certification. *NYSDOT* at 220-221.

[redacted] National Board Certified Teacher, [redacted] stated:

> [The petitioner] and I have taught together for 4 years at [redacted] school.
>
> She is a master teacher and an excellent staff member on the special education department. She is a valuable member to our special education staff and contributes with her knowledge of early childhood and elementary education.
>
> During the time I taught with her she was highly skilled at differentiated instruction. She was also very involved with her students and their families. She consistently adapts the curriculum to meet her students' individual needs. She effectively implemented their IEP's. She also provides support to general education teachers on how to best support special education students in their classrooms.
>
> She continually demonstrates her professionalism in her day to day interaction with parents, administrators and educators.

Ms. [redacted] praises the petitioner's work at [redacted] but Ms. [redacted] s observations do not set the petitioner apart from other competent and qualified teachers, or explain how the petitioner's work has impacted the field beyond her school.

[redacted] a [redacted] teacher, [redacted] stated:

> I have known [the petitioner] for approximately five years. We had the opportunity to work together for these five years. During that time, we have been co-workers, and developed a friendship. We co-taught during our first year together. [The petitioner] is an excellent team player. We planned lessons together, did small groups and always considered what was best for the children. I have seen [the petitioner] grow over these past few years in her professional status. She has become a great classroom disciplinarian, has gained excellent classroom management skills and always teaches with excellence and knows how to meet the needs of the children while incorporating the curriculum in a fun and exciting way.
>
> [The petitioner] goes above and beyond the regular duties of teaching to ensure that her students meet success. She comes in early, stays late and her lessons far exceed the mandatory requirements for a good lesson. She has an excellent relationship with her parents, with her classroom assistants and the students. She does her reports, sets goals for students for IEP meetings, and does everything with excellence.
>
> Although I have been teaching in the county for a longer duration than [the petitioner], she has given me new ideas and a different perspective on how to reach students while implementing the curriculum.

Ms. [redacted] comments on the petitioner's effectiveness as a teacher, but Ms. [redacted] fails to provide specific examples of how the petitioner's work has influenced the field as a whole.

[redacted] Music Teacher, [redacted]

> From what I have seen and observed, [the petitioner] is a very good teacher. She always has her lessons prepared and laid out for parents, teachers, and administration to see. She also has a wonderful word wall to help the students learn to read. In addition, her classroom is very well organized, and she has set up stations with pictures and hands-on materials in order to help the students learn different subjects.
>
> She is very friendly and personal with the students, and yet, she knows how to command their attention and keep them in line. [The petitioner] probably has one of the hardest jobs in the school because she teaches young autism students how to learn academically, and she also succeeds in teaching them how to get along with other people, and how to express their emotions and feelings in an appropriate way, which can be extremely difficult to teach a child with autism at first.

Ms. [redacted] asserts that the petitioner is a "very good teacher" who manages her students effectively, but Ms. [redacted] does not indicate how the petitioner's impact or influence as a teacher is national in scope.

a parent of a student who attends stated:

> [The petitioner] has served as my son's kindergarten teacher at in this school year. [The petitioner] played a critical role in helping my son, who has autism, transition to his new kindergarten environment. . . . [The petitioner] brought stability to his classroom environment, and she has responded very favorably to and to us as parents.
>
> As a young child with autism, transitions are particularly challenging for [The petitioner] did her very best to accommodate to make him feel secure in his environment, and to modify the curriculum to address his complex developmental and emotional needs.
>
> * * *
>
> [The petitioner] is a tremendous asset to my son, the school and special needs children and families.

Mr. speaks highly of the petitioner's interactions with his son, and his comments demonstrate that the petitioner works in an area of substantial intrinsic merit. However, Mr. s comments do not indicate that the petitioner's work has influenced the field as whole, or that the petitioner has or will benefit the United States to a greater extent than other qualified special education teachers.

a parent of a student who attends stated:

> During the 2010 to 2011 school year my son was a student in [the petitioner's] kindergarten autism class. Along with several other students, my son, was able to excel beyond his grade level in [the petitioner's] classroom. His educational development progressed well beyond expectations maintaining grade level skills in general education areas and his reading scores going above grade level.
>
> [The petitioner] is a first rate educator who care [sic] about the education and welfare of her students. She communicated with me techniques to be used at home to help my son with the daily pressures of school taking consideration for his needs as an individual. She was diligent in her task of keeping me informed of my son's progress and areas of concern that need to be addressed. Her teaching style is hands on and I am sure that my son enjoyed his time in her classroom.

Ms. comments on the progress made by her son in the petitioner's classroom and the petitioner's concern for her students, but Ms. fails to explain how the petitioner's work has influenced the field as a whole.

The petitioner's references praise the petitioner's teaching abilities and personal character, but they do not demonstrate that the petitioner's work has had an impact or influence outside of They also do not address the *NYSDOT* guidelines which, as published precedent, are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). That decision cited school teachers as an example of a profession in a field with overall national importance (education), but in which individual workers generally do not produce benefits that are national in scope. *NYSDOT* at 217, n.3.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of the petitioner's references are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

In addition to the reference letters, the petitioner submitted the following:

1. A "Certificate of Achievement" (2006) from the County Executive of s in honor of the petitioner's "service as an educator" in the system;
2. A "Certificate of Appreciation" (2007) from the principal at in recognition of the petitioner's "valuable contributions to the students" at that school;
3. Academic transcripts;
4. A Maryland Educator Certificate with a validity period of July 1, 2009 – June 30, 2014;
5. A School Personnel Licensure Certificate from the State of New Mexico;
6. A State of Colorado Professional Teacher's license;
7. A "Certification of Eligibility" from the tating that the petitioner passed the "Professional Board Examination for Teachers" on November 25, 1990;
8. A "Certification of Eligibility" from the stating that the petitioner passed the "Career Service (Professional) Examination" on July 31, 1988;
9. Employment verifications from various schools where the petitioner has taught;

10. A December 1, 2011 e-mail from the Lead Certification Specialist for informing the petitioner of her "Highly Qualified" teaching status; and
11. A Praxis Series test score report.

Academic records, employment experience, licenses or professional certifications, and recognition for achievements are all elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), and (F), respectively. As noted previously, exceptional ability in the sciences, the arts or business is not sufficient to warrant the national interest waiver. The plain language of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are subject to the job offer requirement (including alien employment certification). Particularly significant awards may serve as evidence of the petitioner's impact and influence on her field, but the petitioner has failed to demonstrate that the two awards she received (items 1 and 2) have more than local or institutional significance. There is no documentary evidence showing that items 1 – 11 are indicative of the petitioner's influence on the field of special education at the national level.

The petitioner submitted a copy of her 2008-2009 "satisfactory" teacher evaluation from and copies of her Student Teacher Evaluation forms from the The petitioner, however, did not submit documentary evidence indicating that she has impacted the field to a substantially greater degree than other similary qualified special education teachers. Moreover, there is no evidence showing that the petitioner's specific work has had significant impact outside of the schools where she has taught.

In addition, the petitioner submitted numerous certificates of participation and completion for training courses and seminars relating to her professional development. While taking courses and attending seminars are ways to increase one's professional knowledge and to improve as a teacher, there is nothing inherent in these activities to establish eligibility for the national interest waiver.

The director issued a Notice of Intent to Deny on October 29, 2012, informing the petitioner that she failed to "demonstrate that the benefits of [her] work extends [sic] beyond her immediate employers and classrooms, or otherwise imparts national-level benefits to the U.S."

In response, the petitioner submitted President George H.W. Bush's "Remarks on Signing the Immigration Act of 1990"; an article entitled "Special Education Teacher Retention and Attrition: A Critical Analysis of the Literature"; an abstract for a report entitled "SPeNSE: Study of Personnel Needs in Special Education"; a statement by U.S. Secretary of Education Arne Duncan on the National Assessment of Educational Progress Reading and Math 2011 Results; information about Public Law 94-142; a copy the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); a copy of Section 1119 of the No Child Left Behind Act (NCLBA); and a September 26, 2011 article in *Education Week* entitled "Shortage of Special Education Teachers Includes Their Teachers." As previously discussed, general arguments or information regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field. *NYSDOT* at 217. Such assertions and information address only the "substantial intrinsic merit"

prong of *NYSDOT*'s national interest test. None of the preceding documents demonstrate that the petitioner's specific work as a special educator has influenced the field as a whole.

The petitioner's response also included a November 29, 2012 letter from counsel. In his letter, counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel asserted that Congress passed the NCLBA three years after the issuance of *NYSDOT* as a precedent decision, and that therefore "[t]here is no longer vagueness or obscurity like what happened in the New York State Department of Transportation case," because "the United States Congress, through the No Child Left Behind Act of 2001, has effectively preempted the Immigration Service to exercise ministerial duty in honoring the self-executory tenets embellished in" that legislation. Counsel, however, identified no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel further stated:

> with respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlighted the phrase "national . . . educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." By the plain language of the statute that counsel quoted above, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for foreign teachers.

Counsel acknowledged that the job offer/labor certification requirement exists to protect United States workers. Counsel contended that a waiver of that requirement would serve the same ultimate goal, by allowing the petitioner to train "today's students [who] need to be academically competitive

to guarantee their employability." Counsel further stated: "today's United States workers or Special Education Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that all "foreign teachers" "were educated by Highly Qualified Teachers." Counsel cited no evidence to support that claim. Again, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Furthermore, counsel essentially contended that "foreign teachers," as a class, are eligible for a blanket waiver of the job offer requirement. As members of the professions, teachers are included in the statutory clause at section 203(b)(2)(A) that includes the job offer requirement.

Counsel stated that the labor certification requirement is deficient because, for labor certification purposes, the U.S. Department of Labor considers a bachelor's degree, rather than a master's degree and experience, to be the minimum educational requirement for a special education teacher. The petitioner submitted information from the U.S. Department of Labor's *Occupational Outlook Handbook* describing the minimum qualifications necessary to become a special education teacher:

> Public school teachers are required to have a least a bachelor's degree and a state-issued certification or license.
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> * * *
>
> Education
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> All states require public special education teachers to have at least a bachelor's degree. Some of these teachers major in elementary education or a content area, such as math or chemistry, and minor in special education. Others get a degree specifically in special education.
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> * * *
>
> Some states require special education teachers to earn a master's degree in special education after earning their teaching certification.
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> * * *
>
> Licenses
>
> All states require teachers in public schools to be licensed. A license is frequently referred to as a certification.
>
> * * *

> Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, which is typically gained through student teaching. Some states require a minimum grade point average.
>
> Many states offer general special education licenses that allow teachers to work with students across a variety of disability categories. Others license different specialties within special education.
>
> Teachers are often required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.
>
> Some states allow special education teachers to transfer their licenses from another state. However, some states require even an experienced teacher to pass their own licensing requirements.
>
> All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification. Some alternative certification programs allow candidates to begin teaching immediately, under the close supervision of an experienced teacher.

Counsel asserted that the petitioner faces a dilemma if the labor certification process is required. Counsel contended that the petitioner possesses qualifications above the minimum required for the job she seeks, but cannot "tailor-fit" an application for labor certification to show those qualifications. The U.S. Department of Labor, however, has already approved a labor certification for the petitioner, and therefore counsel's assertions contradict the evidence in the record.

Counsel further states: "Doing a labor certification process for the Self-Petitioner, faithful to the Foreign Labor Certification regulations, i.e., require only a bachelor's degree, would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind (NCLB) Law." Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis."

The petitioner has not established that the "Highly Qualified" standard involves requirements that are significantly more stringent than those outlined in the *Occupational Outlook Handbook*, or that a public school could not obtain a labor certification for a "Highly Qualified Teacher." Indeed, the petitioner's own approved labor certification required her to hold a bachelor's degree in education or biology, and to "have or be immediately eligible for Maryland Teaching Certificate," elements consistent with the "Highly Qualified" designation. Thus, the petitioner's level of education and experience are not required for "highly qualified" status under the NCLBA. Counsel, therefore, did not support the claim that the labor certification process frustrates the NCLBA's mandate for schools to employ "highly qualified teachers."

Counsel stated that "unquantifiable factors that zero in on 'passion'" distinguish the petitioner from qualified United States workers and that labor certification cannot take these factors into account, but the record contains no evidence to support the claims. As previously noted, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for American workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard. Similarly, under the regulation at 8 C.F.R. § 103.3(c), *NYSDOT* is binding precedent on all USCIS employees, and counsel's assertions pertaining to an alternative standard from unrelated statutes cannot succeed.

Counsel contended that, under the NCLBA, schools that fail to meet specified benchmarks will lose federal funding and be "abolished," thereby putting teachers out of work. Counsel offers no specific example of this situation ever happening. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Counsel also asserted that by waiving the labor certification requirement for highly qualified special educators such as the petitioner, "more American teachers will have employment opportunities" because standards will be met and schools will not be abolished. However, neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for highly qualified foreign teachers.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition "be treated in the same light." Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. *See* 8 C.F.R. § 103.3(c). Furthermore, counsel provided no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is "also a teacher in ."

The director denied the petition on February 13, 2013. The director found that the petitioner failed to establish that an exemption from the requirement of a job offer would be in the national interest of the United States. The director stated that the petitioner failed to demonstrate that her work "will benefit the U.S. on a national level, or that it has otherwise had some influence on the field as a whole."

On appeal, counsel asserts that "USCIS erred in giving insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001 as the guiding principle rather than the precedent case" *NYSDOT*. With regard to following the guidelines set forth in *NYSDOT*, by law, the USCIS does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c).

Counsel asserts that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claims that Congress subsequently filled that gap with the passage of the NCLBA. Counsel states that "Congress has spelled out the national interest with respect to public elementary and secondary school education through the No Child Left Behind Act of 2001." Counsel, however, identifies no specific legislative or regulatory provisions that exempt foreign school teachers from *NYSDOT* or reduce its impact on them. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not exist.

Counsel did not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. Once again, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel asserts that the benefit arising from the petitioner's work is national in scope because of the "national priority goal of closing the achievement gap." The record, however, contains no evidence that the petitioner's efforts have significantly closed that gap. The national importance of "education" as a concept, or "educators" as a class, does not establish that the work of one teacher produces benefits that are national in scope. *See NYSDOT* at 217, n.3. A local-scale contribution to

an overall national effort does not meet the *NYSDOT* threshold. The aggregate national effect from thousands of teachers does not give national scope to the work of each individual teacher.

Counsel continues:

> The national priority goal of closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children is especially relevant in the context of and The 2012 MSA [Maryland School Assessment] Reading results show that out of the 24 Maryland school districts ranked near the bottom at the 'All Student' level for each MSA-covered grade level . . . .

The petitioner worked for from 2005 – 2012, and thus had been there for a number of years before the administration of the 2012 MSA tests. Counsel fails to explain how the 2012 MSA results for (which indicate low rankings relative to other Maryland school districts) establish that the petitioner has played an effective role in "closing the achievement gap."

Counsel states that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but he cited no documentary evidence to support that claim. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Regardless, there is no documentation demonstrating that the petitioner has had an impact or influence in raising student proficiency in STEM outside of Skyline Elementary School.

Counsel asserts that the "director erred in his appreciation of petitioner's past achievement," but counsel fails to point to specific evidence in the record showing that the petitioner's work has had a national impact or has otherwise influenced the field as a whole.

Counsel states that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers and that USCIS "should have presented its own comparable worker." Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision, however, is that the petitioner must establish a record of influence on the field as a whole. Moreover, there is no provision in the statute, regulations, or *NYSDOT* requiring the director to specifically identify another equally qualified special educator. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

Counsel asserts that USCIS "is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As previously discussed, the requirements for exceptional ability are separate from the threshold for the national interest waiver. It remains that the petitioner's evidence

does not facially establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond her classroom or the school system that employed her.

Counsel cites to several studies pointing to high turnover rates and inexperience among special education teachers. A shortage of qualified workers in a given field is an issue that falls under the jurisdiction of the Department of Labor through the alien employment certification process. *NYSDOT* at 221. This information shows that there is a demand for credentialed special education teachers, a demand that the labor certification process can and, in this instance, did address.

Counsel again argues that the labor certification guidelines "require only a bachelor's degree," and therefore "may not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." On page 12 of the appellate brief, however, counsel acknowledges that the statutory definition of a "highly qualified" teacher requires only a bachelor's degree.

Counsel asserts that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Again, counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements, and the record does not show that the petitioner's work has brought schools closer to meeting the NCLBA requirements.

Much of the appellate brief consists of general statements about educational reform and discussion of perceived flaws in the labor certification process. The petitioner, however, has not established that Congress intended the national interest waiver to serve as a blanket waiver for special education teachers. USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *Id.* at 217.

It is evident from a plain reading of the statute that engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. The petitioner has not established that her past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *Id.* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole."). On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende* at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.